115 D

Supreme Court, U.S.
FILED

No. 08-08-815 DEC 23 2008

OFFICE OF THE CLERK

In The

Supreme Court of the United States

ROBERT DEUPREE,

Petitioner,

v.

THE WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA, UNINSURED EMPLOYERS BENEFITS TRUST FUND, and MON DOE 43,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District

PETITION FOR WRIT OF CERTIORARI

SCOTT WM. DAVENPORT*
STEVEN J. RENICK
MANNING & MARDER,
KASS, ELLROD, RAMIREZ LLP
19800 MacArthur Blvd., Ste. 600
Irvine, CA 92612
Telephone: (949) 440-6690
Facsimile: (949) 474-6991

Attorneys for Petitioner, Robert Deupree

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

After an adult film star ("Doe") – who had a prior history of prostitution, drug addiction, and unprotected sex both on and off camera – was diagnosed with HIV, she filed a workers' compensation claim. At trial, Doe testified that she subjectively believed her injury was industrial in nature because Doe's friend told her one of Doe's co-stars tested HIV positive. However, no substantive evidence was presented that the co-star was actually HIV positive, that he was the source of Doe's infection, or that Doe's infection was contracted during this particular film as opposed to one of Doe's 200 other adult films or personal sexual liaisons.

Despite this lack of any substantial evidence whatsoever, the administrative law judge found Doe's injury industrial in nature – a decision which was upheld in three summary denials at three levels of appellate review – thereby evidencing a deeply-flawed Potemkin Court system which presents the following issue:

Does an administrative adjudicatory system that allows large awards of money to be made based solely on unsubstantiated double and triple hearsay, unsupported by any other evidence, comport with the fundamental constitutional requirements of due process and equal protection?

PARTIES TO THE PROCEEDING

Petitioner (defendant and appellant below):

ROBERT DEUPREE

represented by Scott Wm. Davenport, MANNING & MARDER, KASS, ELLROD, RAMIREZ, LLP, 19800 MacArthur Blvd., Ste. 600, Irvine, CA 92612; (949) 440-6690.

Respondents (appellees below):

WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA

represented by Neil P. Sullivan, Esq., WORKERS' COMPENSATION APPEALS BOARD APPELLATE UNIT, 455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102; (415) 703-5028.

UNINSURED EMPLOYERS BENEFITS TRUST FUND

represented by Vanessa L. Holton, Chief Counsel, DEPARTMENT OF INDUSTRIAL RELATIONS, 320 West 4th Street, Ste. 600, Los Angeles, CA 90013; (213) 576-7725.

MON DOE 43

represented by Elliot S. Berkowitz, BERKOWITZ & COHEN, 6500 Wilshire Blvd., Ste. 1860, Los Angeles, CA 90048; (323) 651-5151.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
BASIS FOR JURISDICTION IN THIS COURT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
REASONS FOR GRANTING CERTIORARI	9
LEGAL ARGUMENT	13
AN ADMINISTRATIVE ADJUDICATORY SYSTEM THAT ALLOWS LARGE AWARDS OF MONEY TO BE MADE BASED SOLELY ON UNSUBSTANTIATED DOUBLE AND TRIPLE HEARSAY, UNSUPPORTED BY ANY OTHER EVIDENCE, DOES NOT COMPORT WITH THE FUNDAMENTAL CONSTITUTIONAL REQUIREMENTS OF DUE PROCESS AND EQUAL PROTECTION	13
A. Constitutional Guarantees of Due Process and Equal Protection	13
B. The California Workers' Compensation System	15

TABLE OF CONTENTS – Continued

Page

C. The Status of the Undisputed Factual Record 15

D. Statutory Changes Fail to Provide Protection Against Due Process and Equal Protection Violations 16

CONCLUSION 18

APPENDIX

Order Denying Petition for a Writ or Review [from the California Court of Appeal] .....App. 1

Order Denying Reconsideration [from Administrative Appeals Board] .....App. 2

Report and Recommendation on Petition for Reconsideration [from the Administrative Law Judge] .....App. 4

Order Denying Petition for Review [from the California Supreme Court] .....App. 16

TABLE OF AUTHORITIES

Page

CASES

Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938) 14, 15, 16

In re: Gault, 387 U.S. 1 (1967) 13

In re: Oliver, 333 U.S. 257 (1948) 14

Nixon v. Herndon, 275 U.S. 536 (1927) 14

Spano v. New York, 360 U.S. 315 (1959) 14

Turner v. Louisiana, 379 U.S. 466 (1965) 14

Williams v. United States, 341 U.S. 97 (1951) 13

CONSTITUTIONAL PROVISIONS

California Const., art. XIV 15

U.S. Const., Amendment XIV 1, 9, 13

STATUTES

28 USC § 1257(a) 1

California *Labor Code*

Section 3202 ..... 10, 15

Section 3202.5 10

Section 3351 15

Section 4062.9 10

Section 5708 ..... 14, 15

TABLE OF AUTHORITIES – Continued

Page

OTHER SOURCES

Random House, Webster's Unabridged Dictionary (2006) 13

Senate Bill 899 10

United States Supreme Court Rule 10 ..... 12, 18

OPINIONS BELOW

The Report and Recommendation on Petition for Reconsideration filed by the Administrative Law Judge (App. 4-15), as well as the summary denials of the Workers' Compensation Appeals Board (App. 2-3), the California Court of Appeal (App. 1) and the California Supreme Court (App. 16), were not reported.

BASIS FOR JURISDICTION IN THIS COURT

The California Supreme Court filed its order denying petitioner's petition for review on October 1, 2008. 28 USC § 1257(a) confers jurisdiction on this Court to review on a writ of certiorari the final judgments or decrees rendered by the highest court of a State.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Petitioner alleges that he has been deprived of his rights secured by the Fourteenth Amendment, the relevant part of which reads as follows:

> *FOURTEENTH AMENDMENT* (Section 1): "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of

> citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

After an adult film star ("Doe") – who had a prior history of prostitution, drug addiction, and unprotected sex both on and off camera – was diagnosed with HIV, she filed a workers' compensation claim.

At trial, Doe testified that she subjectively believed her injury was industrial in nature because Doe's friend told her one of Doe's co-stars tested HIV positive. However, no substantive evidence was presented that the co-star was actually HIV positive, that he was the source of Doe's infection, or that Doe's infection was contracted during this particular film as opposed to one of Doe's 200 other adult films or personal sexual liaisons.

Despite this lack of any substantial evidence whatsoever, the administrative law judge found Doe's injury industrial in nature. This decision was upheld in three summary denials by the Administrative Appeals Board (App. 2-3), the California Court of Appeal (App. 1), and the California Supreme Court (App. 16).

This timely petition follows.

STATEMENT OF THE FACTS

Between January of 1998 and March 29, 1998, Doe contracted to star in an adult film which would involve her participating in various sex acts with 50 different men. Exhibit C,[1] at 104, 109. At the time the contract was executed, Doe, who had been an adult film star since she was 18 years old, had participated in approximately 200 films, sometimes using condoms and sometimes having unprotected sex. *Id.* at 108, 112-113. In addition, Doe had a prior arrest for prostitution and had a prior drug problem involving both crystal methamphetamine and cocaine. *Id.* at 111, 113.

The film in question was shot over a three day period spanning three months between January of 1998 and late March of 1998. *Id.* at 104, 109. Doe could not remember – and did not present any evidence regarding – which session of the filming she allegedly had unprotected sex with Mark Wallace, the individual from whom she "believes" she contracted HIV. *Id.* at 117, 120. Moreover, during the course of the three month production, Doe admitted to having

[1] This and all following citations to the record refer to the Exhibits presented in Support of the Verified Petition for Review filed in *Deupree v. WCAB (Mon Doe 43)*, California Court of Appeal Case No. B206477.

had unprotected sex with other individuals and even to have filmed another movie in which she had unprotected sex. *Id.* at 113, 117.

Doe first discovered that she was HIV positive on March 27 or 29, 1998. *Id.* at 110. It was her subjective belief that she contracted HIV from Mark Wallace, one of the actors in the production in question. Wallace, however, never admitted to being HIV positive and no substantive evidence was introduced that he was. *Id.*

The following is the ***only*** testimony received at the trial on the issue of whether Doe was infected with HIV in the course and scope of her employment. (The total amount of testimony is so limited that all of it is set out verbatim below, along with some additional testimony for context.)

> "Q. After the filming of the movie, did you find out that anyone on the set that was in the movie had become HIV positive?
>
> MR. BARNARD: Calls for hearsay, objection to the extent that it calls for hearsay.
>
> THE COURT: Overruled.
>
> THE WITNESS: [Mark Wallace][2] was positive.

---

[2] In the Reporter's Transcript, the actual language reads "(Name omitted by Court Reporter)." However, the Minutes of Hearing and Summary of Evidence for this date, identifies this individual as "Mark Wallace, who is also known as Mark

(Continued on following page)

Q. Was [Mark Wallace] one of the persons you mentioned that had sex with you?

A. Yes, he was in the movie.

Q. [Mark Wallace] is also known as [Mark Goldberg]; is that correct?

A. Yes, that is correct.

Q. Did you ever speak to [Mark Wallace] after the movie?

A. Yes, I did.

Q. Did he ever tell you he was HIV positive?

MR. BARNARD: Objection, hearsay.

THE COURT: Overruled.

THE WITNESS: No.

Q. BY MR. BERKOTIWZ [*sic*]: How did you find out he was HIV positive?

A. I went over to my girlfriend's Sandra Morton's and I had a discussion with her and they had said [Mark Wallace] was positive for a long time and he had been forging his test.

MR. BARNARD: Move to strike as hearsay.

Goldberg." For the sake of clarity, all further references in the Reporters' Transcripts to "(Name omitted by Court Reporter)" or other similar notations will be replaced with the name of the persons being referred to.

THE COURT: Overruled.

Q. BY MR. BERKOWITZ: Was any of this ever publicized in any newspapers to your knowledge?

A. Yes, it was published in *The Los Angeles Times*. It's been on CNN, MTV's True Life.

Q. And to your knowledge did Mr. [Wallace] ever admit he was HIV positive?

A. No."

Exhibit M, at 12, 14-16.

"Q There was another gentlemen [*sic*] involved who had a positive HIV test according to the newspapers?

MR. B[A]RNARD: Objection. Assumes facts not in evidence. Is he talking about a newspaper article or any positive testing.

MR. BERKOWITZ: We will go through this.

THE COURT: Sustained.

Q (BY MR. BERKOWITZ) Are you familiar with the controversy involved as a result of my client DOE 43?

A [BY STEVEN RANDALL MISHO] Yes, I am.

Q And what makes you aware of that controversy?

MR. B[A]RNARD: Objection. Vague and ambiguous. By 'controversy' is he referring to

the pending workers' compensation matter or some other film?

THE COURT: Sustained.

Q (BY MR. BERKOWITZ) Are you aware that there is a [*sic*] allegation of one of the performers being positive for HIV?

A Yes.

Q And for the record, who is that performer?

A Mark Wallace.

Q How did you become aware of that information.

A The article written in AVN.

Q 'AVN' meaning what?

A Adult Video News. . . ."

Exhibit O, at 7-8.

Q. There was one person who the industry felt was responsible for the HIV infection, correct?

MR. B[A]RNARD: Objection, lacks foundation. There is no evidence offered to support that contention.

THE COURT: He can answer what he knows or thinks. It will go to the weight of the evidence.

MR. BERKOWITZ: It is a fundamental part of the applicant's case-in-chief, your

Honor, establishing that there is an infection at all.

MS. TU-WILLIS: I'll object on hearsay as well.

THE COURT: Overruled on hearsay. You can answer the question if you know the answer.

THE WITNESS [CASH MARKMAN]: The belief within the industry is that she could have been exposed to HIV from Mar[k] [Wallace] on that production or it could have happened a previous time they worked together or from her social life.

Q. BY MR. BERKOWITZ: But this person, Mar[k] [Wallace], is HIV positive; is that correct?

A. To my understanding, yes.

MR. BARNARD: Objection, calls for hearsay.

THE COURT: Overruled. Once again it goes to the weight of the evidence.

Q. BY MR. BERKOWITZ: Was anyone else on the production of one, two or three who had worked with Mar[k] [Wallace] found to be HIV positive to your knowledge?

A. No.

Q. But to your knowledge, Mar[k] [Wallace] was found to be positive after being tested

after the Production one, two or three, correct?

A. Yes."

Exhibit P, at 13-15.

REASONS FOR GRANTING CERTIORARI

It is a fundamental maxim of our system of government that no person should be deprived of life, liberty or property without due process of law nor should any person be denied the equal protection of the law. Amendment XIV. However, this basic tenant is frequently abandoned in the various administrative adjudicatory systems in place throughout not just California, but the entire nation.

Unfortunately, under many of these systems, the administrative law judges – who often times are not jurists (and, in some situations, are not even attorneys) – fail to preside over contested matters in an impartial manner and, instead, engage in result-oriented decision-making. In engaging in such "street justice" which is outside of the law, these individuals forsake their obligations to serve as a neutral trier of fact and, instead, attempt to impose some form of Solomonic justice upon the parties which is separate and distinct from the law. Nowhere is this historical problem more evident than in the California Workers' Compensation system.

Based on these and other endemic problems, for the last several years, California experienced a workers' compensation crisis. Many workers' compensation insurers declared bankruptcy and others refused to write new policies. California had the highest rates for workers' compensation insurance in the nation, causing businesses to flee the state for other jurisdictions. These problems were bought about by a system which had at its core the mandate that all rules were to be "liberally construed by the courts with the purpose of extending their benefits" (California *Labor Code*, § 3202) and the presumption that the findings of the personal physician or personal chiropractor are "presumed to be correct" (California *Labor Code*, § 4062.9, repealed by Stats. 2004 ch. 24, § 22 (SB 899).

In response to this staggering problem, the California Legislature enacted Senate Bill 899 which called for "radical reforms" to be made to the workers' compensation system. These reforms included "novel" and "controversial" provisions such as declaring that all parties were required to meet their evidentiary burden of proof and that all parties were to be considered equal before the law. California *Labor Code*, § 3202.5.

Inertia, however, is a powerful thing. Just as a battleship cruising at full speed cannot be turned on a dime, neither can a deeply-flawed system with a pre-existing institutional pre-disposition be expected to be cured with a band-aid. This is the unfortunate position presented in this case.

In this case, the sum total of the evidence presented was speculation regarding the source of Doe's infection, which was not rendered substantial merely because individuals testified that they "heard" it from someone, saw it on television, or read it in a newspaper.

In light of this undisputed record, there is no underlying factual dispute that would obviate against review via certiorari. Indeed, at every one of the three levels of appeal, petitioner challenged respondent to point to a single scrap of evidence which would demonstrate that respondent has met her burden of presenting substantive evidence which would support her claim that she was infected in the course and scope of her employment and which would quickly dispel the allegations in the petition. This challenge, however, was met with a refusal – and, indeed, disdain – at each level.[3]

Regrettably, this is not a fact-specific case in which petitioner is asking this Court to review for error. Rather, petitioner is asking that this Court exercise its oversight role to insure that a court of inferior jurisdiction properly apply the law and give

---

[3] Most recently, in her Answer to the Petition for Review in the California Supreme Court, Doe refused to cite to any evidence which would refute petitioner's claims, stating, "This brief will not refer directly to the pages and lines in the Minutes of Hearing or transcript for the sake of brevity." Answer to Petition for Review, at 4.

due weight to fundamental constitutional notions of due process and equal protection.

Indeed, the dirty little secret underlying this case is that many adjudicatory agencies have grown cavalier in the quantum of evidence they require and this failure to properly uphold fundamental notions of due process has resulted in parties being denied the benefit of a just determination. This problem is exacerbated by the fact that when the sole manner of appellate review consists of discretionary review based on petitions for extraordinary relief, a litigant is denied the benefit of any meaningful appellate review. This one-two punch has resulted in the miscarriage of justice in this case, as well as countless others.

Administrative adjudicatory systems should do better than this. They can do better. And they must do better.

Accordingly, certiorari is necessary to resolve these important questions regarding the scope of a litigant's fundamental right to due process and equal protection in administrative adjudications. United States Supreme Court Rule 10.

LEGAL ARGUMENT

AN ADMINISTRATIVE ADJUDICATORY SYSTEM THAT ALLOWS LARGE AWARDS OF MONEY TO BE MADE BASED SOLELY ON UNSUBSTANTIATED DOUBLE AND TRIPLE HEARSAY, UNSUPPORTED BY ANY OTHER EVIDENCE, DOES NOT COMPORT WITH THE FUNDAMENTAL CONSTITUTIONAL REQUIREMENTS OF DUE PROCESS AND EQUAL PROTECTION

A. Constitutional Guarantees of Due Process and Equal Protection

The Fourteenth Amendment guarantees that no person should be deprived of life, liberty or property without due process of law nor should any person be denied the equal protection of the law. The failure to afford these most basic of constitutional protections is antithetical to our system of jurisprudence.

This Court has repeatedly held that a party has a right "to be tried by a legally constituted court, not a kangaroo court."[4] *Williams v. United States*, 341 U.S. 97, 101 (1951). In analyzing when a court system fails to pass constitutional muster, this Court has held that any court system lacking in due process protections violates the Fourteenth Amendment. *In re: Gault*, 387 U.S. 1, 28 (1967) [juvenile court system

---

[4] A kangaroo court is defined as "any crudely or irregularly operated court, esp[ecially] one so controlled as to render a fair trial impossible." Random House, Webster's Unabridged Dictionary (2006).

devoid of due process protections constitutes an unconstitutional "kangaroo court"]; *Spano v. New York*, 360 U.S. 315, 325 (1959) [criminal procedural lacking due process protections invalidated as a "kangaroo court"].

Indeed, it is a fundamental notion of constitutional law that due process does not permit a court to make a finding based on no evidence, *Nixon v. Herndon*, 273 U.S. 536 (1927), or on evidence so unreliable and untrustworthy that it may be said that the accused had been tried by a kangaroo court. Cf. *In re: Oliver*, 333 U.S. 257 (1948); *Turner v. Louisiana*, 379 U.S. 466 (1965).

Moreover, although it is true that hearsay evidence is admissible in many administrative adjudications – including California workers' compensation matters (see California *Labor Code*, § 5708) – due process requires more than "remote hearsay" and "mere rumor." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229-230 (1938). As this Court noted in another administrative adjudication case nearly 70 years ago:

> "The statute provides that 'the rules of evidence prevailing in courts of law and equity shall not be controlling.' The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. But this assurance of a desirable flexibility in administrative

> procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence." *Id.*, citations and footnote omitted.

B. The California Workers' Compensation System

Under California law, with a few exceptions, all California employers are liable for the compensation provided by the state's workers' compensation system to employees injured or disabled in the course and scope of their employment. Cal. Const., art. XIV, § 4; see also California *Labor Code*, § 3351.

California *Labor Code*, § 3202 provides that issues of compensation for injured workers "shall be liberally construed by the courts with the purpose of extending benefits for the protection of persons injured in the course of their employment." Moreover, the California system provides that hearsay evidence is admissible and that the administrative law judge "is not bound by the common law or statutory rules of evidence and procedure. . . ." California *Labor Code*, § 5708.

C. The Status of the Undisputed Factual Record

As stated above, there is no underlying factual dispute in which case which would obviate against

review via certiorari. Here, the sum total of evidence presented in this case regarding the source of Doe's infection was speculative; and although this evidence may have been admissible given the loose evidentiary standards at an administrative adjudication, it was not rendered substantial merely because individuals testified that they "heard" it from someone, saw it on television, or read it in a newspaper.

Indeed, as stated above, due process requires more than such "remote hearsay" and "mere rumor." *Consolidated Edison Co. v. NLRB, supra*, 305 U.S. at 229-230. Rather, the law requires *substantial evidence*, and "mere uncorroborated hearsay or rumor does not constitute substantial evidence." *Id.* at 230.

Facing this defect in the quantum and quality of evidence presented, at the administrative hearing and at three subsequent levels of appeal, petitioner challenged Doe to point to a single scrap of substantive evidence which would demonstrate that she met her burden of presenting substantial evidence which would support her claim. This was never done, nor could it be given the undisputed state of the record.

D. Statutory Changes Fail to Provide Protection Against Due Process and Equal Protection Violations

Like one crying out in the darkness, petitioner consistently raised the failure in the quantum of evidence provided. However, four separate courts (an administrative hearing and three subsequent levels

of appeal) refused to respond to the fact that no substantive evidence was presented at trial to establish causation and that the case was decided entirely on the basis of speculation, hearsay and industry gossip.

The proper resolution of this case was not a close call. Indeed, there was virtually no call to be made at all. Despite having ***four*** opportunities to do so, respondent never responded to the challenge to point to any substantive evidence whatsoever which would refute the deficiency in the evidence.

This case presents a troubling example of how litigants in administrative adjudications are frequently denied their fundamental rights to due process, equal protection, and any meaningful appellate review. The issuance of rubber stamp summary denials in the face of an indisputable failure in the quantum of evidence presented leaves the parties without an appropriate remedy and shallow comfort in their belief that they received a fair hearing.

Moreover, in circumstances such as this – where there is no genuine dispute regarding the factual allegations – an appellate court should not be allowed to simply punt and decline to review the matter. The failure to intervene illustrates that there is simply no meaningful check or balance in the California workers' compensation system. Indeed, if a case such as this is allowed to stand – where there is only unsubstantiated double and triple hearsay, unsupported by any other evidence – no applicant need ever worry

that he or she had failed to meet his or her burden of proof.

As stated above, this situation is not *sui generis*. The unfortunate reality is that many adjudicatory agencies have become lax in upholding their obligations to provide due process to all litigants. This failure of process becomes exacerbated when the litigant is denied any meaningful appellate review through the issuances of summary denials in the face of clear error. This one-two punch gives way not only to a miscarriage of justice in countless cases, but also a complete lack of confidence in the system as a whole.

Accordingly, certiorari is necessary to resolve these important questions regarding the scope of a litigant's fundamental right to due process and equal protection in administrative adjudications. United States Supreme Court Rule 10.

CONCLUSION

For all the foregoing reasons, petitioner submits that where an administrative adjudicatory system allows large awards of money to be made based solely on unsubstantiated double and triple hearsay, unsupported by any other evidence, that system does not comport with the fundamental constitutional requirements of due process and equal protection.

Accordingly, petitioner requests that this Court **grant** the petition for a writ of certiorari.

Respectfully submitted,

MANNING & MARDER,
KASS, ELLROD, RAMIREZ LLP

SCOTT WM. DAVENPORT*
STEVEN J. RENICK

Attorneys for Petitioner,
Robert Deupree

**Counsel of Record*

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

ROBERT DEUPREE, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD, MON DOE 43 et al., Respondents.	B206477 (W.C.A.B. No. MON 0246728) ORDER (Filed Aug. 19, 2008)

THE COURT:

The petition for writ of review and answers have been read and considered. The petition for writ of review and Mon Doe 43's request for attorney's fees and costs are denied.

/s/ Perluss
PERLUSS, P.J.

/s/ Woods
WOODS, J.

/s/ Zelon
ZELON, J.

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MON 43 DOE, ***Applicant,*** **vs.** **HCTV CORPORATION, ET AL.,** ***Defendant(s).***	**Case No. MON 0246728** **ORDER DENYING RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in said report which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that said Petition for Reconsideration be, and it hereby is, DENIED.

WORKERS' COMPENSATION APPEALS BOARD

/s/ F. M. Brass
FRANK M. BRASS

I CONCUR

/s/ Alfonso J. Moresi
ALFONSO J. MORESI

[SEAL]

/s/ Ronnie G. Caplane
RONNIE G. CAPLANE

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEB 01 2001

SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

ELLIOTT BERKOWITZ
RONALD CANTER
ZAKS & BARNARD

/s/ [Illegible]

ebc

WCAB Case No. MON 0246728

MON DOE 43		**HCTV Corporation, et al**
Applicant	**vs.**	**Employer**
1/98 – 3/29/98		**Illegally Uninsured by UEBTF**
Date of Injury		**Insurance Company**

Workers' Compensation
Administrative Law Judge: LISA A. SUSSMAN

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

1. Applicant's Occupation : Adult film actress
   Applicant's Age : 24
   Date of Injury : 1/98 – 3/29/98
   Bodily Injuries claimed : internal and psyche
2. Identity of Petitioner : ***Defendant***, Robert DeuPree filed the Petition.
   Timeliness : The petition was timely filed.
   Verification : The petition is verified.
3. Date of Findings and Orders : 12/4/07
4. **Petitioners contentions** :

   a) that the WCJ erred in finding applicant to be an employee of defendant HCTV Corp.;

   b) that the WCJ erred in finding applicant sustained internal injury in the form of HIV while in the course and scope of her employment with defendant HCTV; and,

c) that the WCJ erred in finding that defendant, Robert DeuPree, was a substantial shareholder of HCTV for the period 1/98 through 3/29/98.

II
FACTS

Applicant, MON DOE 43, an adult film actress, filed an application on 2/9/99 against defendant HCTV, as well as others, alleging that during the period January 1998 through March 29, 1998, she was employed by defendant HCTV (Hard Core Television) and therein sustained internal injuries in the form of HIV during the course and scope of said employment. Sometime thereafter, applicant added psyche to her claim. Defendants denied injury AOE/COE and further alleged applicant was an independent contractor and denied employment.

An arbitration was held in front of G. Ronald Feenberg Esq., who issued a Findings and Order on November 10, 2004, in which he found that participating defendants, Steven Strucker and K. Beech Video, should be dismissed as party defendants due to an absence of an employment relationship with MON DOE 43.

On March 29, 2007, this matter proceeded to trial against defendant HCTV Corp. and defendant Robert DeuPree, alleged to be a substantial shareholder of HCTV Corp. After several hearings, testimony completed on October 11, 2007, at which time the parties were given until November 2, 2007 to submit

simultaneous post-trial briefs after which the matter would stand submitted.

On December 4, 2007, a Findings and Orders issued, in which it was found that the applicant, MON DOE 43, was an employee of defendant HCTV and further, that she sustained internal injury AOE/COE in the form of HIV, but that she was barred from claiming compensation for injury to her psyche due to the 6 month employment limitation. It was also found that defendant, Robert DeuPree, was a substantial shareholder of defendant HCTV during the period 1/98 through 3/29/98. Finally, the court found that the medical record needed further development, and ordered same.

It is from the findings of employment, injury AOE/COE and substantial shareholder status that defendant Robert DeuPree seeks Reconsideration.

DISCUSSION:

Defendant Robert DeuPree disputes the finding that DOE 43 was an employee of HCTV Corporation at the time of filming of the HCTV gang bang movie, but concedes that the analysis of whether one is an employee rendering services to another turns on the particular facts and circumstances of each case. As is stated in the Opinion on Decision, under the Workers Compensation Act, the "control-of-work-details" test for determining whether a person rendering service to another is an employee or an excluded independent contractor, as well as the other factors relevant to the

ultimate determination, must be applied with deference to the purposes of the protective legislation. The nature of the work and the overall arrangement between the parties must be examined to determine whether they come within the "history and fundamental purposes" of the statute. *Laeng v. WCAB* (1972) 6 Cal.3d 771, 37 CCC 185.

Those purposes are several. Among other things, the Act represents society's recognition that if the financial risk of job injuries is not placed upon the businesses which produce them, it may fall upon the public treasury. It further seeks to guarantee prompt, limited compensation for an employee's work injuries, regardless of fault, as an inevitable cost of production, to spur increased industrial safety, and in return, to insulate the employer from tort liability for his employees' injuries. *Laeng,* at p. 782.

Defendant claims that MON DOE 43 was involved in the control of work details and negotiation of the terms of her performance in the HCTV movie and asserts that the terms of the film were discussed at length and negotiated between DOE 43 and producer, Dan Beck, before filming began.

The evidence, however, belies this assertion. The fact that the applicant was able to convince Cash Markman to speak to Dan Beck on MON DOE 43's behalf after she voiced concern about certain actors hired for the gang bang shoot while at the actual filming and that some of these actors were sent home after she voiced concern about some of the actors to

be used in the shoot does not equate to applicant having control over the production. Further, although defendant alleges that applicant negotiated some of the terms of the "contract", the alleged "contract" for the anal gang bang film was labeled Exxxtacy girls artist agreement, was unsigned by either Dan Beck or any agent for HCTV, was a pre-printed form, and was unaltered in any way by either party, thus failing to document any negotiation by the parties. The testimony was that terms were discussed, not that said terms were negotiable.

While it is true that applicant testified she was paid a flat fee for her performance in the gang bang film, while a factor to consider, said fact alone is not dispositive.

In the case of *Durae v. IAC* (1962) 27 CCC 240; 206 Cal. App. 2d 691, referred to in the Opinion on Decision in which the applicant stunt actor was found to be an employee of the defendant, said applicant was also paid a lump sum for his set of performances, however the court found employment.

Defendant also argues that since applicant was "key talent" she had contracting power and was a vital part of this film, thereby lending credence to the assertion that she was an independent contractor. As stated in *Durae,*

> Even where a high degree of skill is required, if the occupation is one which ordinarily is considered an incident of the business of the employer, there is an inference that the

> skilled person is an employee. (Rest., Agency, 2d, § 220, comment i.) Applicant was not left, like a plumber, an auto mechanic, or an electrician, "to produce the desired result in his own way." (See *Bennett v. Truebody,* 66 Cal. 509, 512; *Ponsetti v. IAC.,* 5 Cal.App.2d 498, 500; *Perguica v. IAC.,* 29 Cal.2d 857, 862). "Nor is it inconsistent with the theory that the applicant was not an independent contractor that she might perform other work than that for the principal." (*Hartford A. & I. Co. v. IAC.,* 93 Cal.App. 313, 316.) *Durae,* at p. 243, 244.

For all of the above stated reasons, an employment relationship was reasonably found.

Defendant also asserts that there is no substantial evidence to support the WCJ's finding that applicant sustained industrial injury AOE/COE, as no evidence, other than hearsay, was presented that the actor who is claimed to have infected MON DOE 43, in fact, has HIV.

Hearsay evidence, unlike in civil court, is admissible in workers compensation. It will be given the proper weight in light of all the evidence presented. Applicant, witness Steven Misho, as well as director Cash Markman all confirmed in their testimony that actor Wallice was the person responsible for the HIV outbreak in 1998 and that after the filming of the herein movie, the porn industry was shut down for a while. This testimony was unrefuted by any person, including Mr. DeuPree.

Thus, based upon the unrebutted testimony of the applicant, as well as witnesses Markman and Misho, the documentary evidence in this matter, and the report of Bruce Gillis, M.D., dated 9/9/99, it was found that applicant sustained injury in the form of HIV while in the course and scope of her employment during the period 1/98 through 3/98 with defendant HCTV.

Finally, defendant DeuPree disputes the WCJ's finding that he was a substantial shareholder of HCTV Corporation during applicant's employment from 1/98 – 3/29/98. In support of this contention, defendant states that LC §3717(b) defines a substantial shareholder is one who owns at least 15% of the total value of all classes of stock, or if no stock has been issued, who owns at least 15% of the beneficial interests of the corporation. Defendant asserts that since stock was issued for HCTV corporation, and since the Stock Transfer Agreement dated October 4, 1997 purportedly transfers HCTV stock to Dan Beck from Robert DeuPree, he cannot be deemed a substantial shareholder as a matter of law per Labor Code §3717(b), and it is irrelevant whether he had a beneficial interest in the corporation.

This argument fails on many levels and for many reasons.

First, it has not been established to this WCJ's satisfaction that there was ever stock issued by HCTV Corporation. The only evidence that stock existed is a notation on Defendant's Exhibit D-8,

which is the Nevada Secretary of State information changing the name of Anvil Agri Technologies to HCTV Corporation on August 11, 1997. This document further states that HCTV Corporation was incorporated on September 20, 1989, which would have been 8 years prior to HCTV's existence. Further, said document lists Robert DeuPree as the President, Secretary, and Treasurer of the company until the nomination of Steven Strucker, who ultimately resigned from these positions and further signed an uncontested sworn affidavit on March 2, 2000 that he never had any interest in HCTV Corporation (Defendant Exhibit D-7).

Second, although LC§3717(b) defines a substantial shareholder as one with 15% stock ownership, or 15% of the beneficial interest of the corporation if no stock is issued, LC §3717(c) mandates use of the rules of attribution of ownership as spelled out in Section 17384 of the Revenue and Taxation Code to determine the ownership of stock or beneficial interest in such a corporation. Unfortunately, Section 17384 of the Revenue and Taxation Code was repealed in 1993 (despite reference to it in the 1994 revised version of LC §3717) and thus cannot be used for such a determination. As such, other factors must be considered in determining whether a person has 15% stock ownership and/or a beneficial interest in the corporation. This WCJ considered all relevant facts and evidence in reaching the conclusion that Mr. DeuPree was a substantial shareholder of defendant HCTV Corporation.

Defendant agrees that the only evidence pertaining to the disposition of the alleged stock is the Stock Purchase Agreement of October 4, 1997. Reviewing said Stock Purchase Agreement, Mr. DeuPree was to transfer 100% of stock ownership to Dan Beck, yet Mr. DeuPree would continue to fund the corporation and Mr. Beck, the alleged new owner of 100% of the shares of the corporation, would receive a salary of $2,200.00 per month until such time as he paid back DeuPree, in full, for his investment. In the interim, Mr. DeuPree would receive the remainder of the profits until he was fully paid back.

This agreement further states that it is crucial that the [sic] no one except the parties to the agreement ever see the agreement or have any knowledge of same, which would be inconsistent with the purpose of the agreement. Further, upon questioning as to whether the agreement meant that Mr. Beck could terminate his relationship with Mr. DeuPree at any time, DeuPree testified that the stock purchase agreement really meant that his involvement with the corporation would end when he was paid back in full by Mr. Beck on his investment.

Mr. DeuPree further stated he transferred the stock because he learned Mr. Beck wanted to get into the adult film industry and DeuPree did not want to be involved in the adult film business. This testimony seems disingenuous given that the company name designated by Mr. DeuPree, at Mr. Beck's request, was Hard Core Television (HCTV). Also, despite the alleged distancing of Mr. DeuPree from the company,

he still attended a couple of live shows per the testimony of the parties. Also, Mr. DeuPree acknowledged going to film distributor, K-Beech, to see if he could collect money from them that was owed to him by Dan Beck. DeuPree also testified he believed he received the HIV tests for the movie and kept them in his fire safe.

Further, although initially claiming to have no knowledge of whether he actually signed any of the checks to pay the performers in the gang bang movie, including MON DOE 43, Mr. DeuPree was reminded of his deposition testimony wherein he acknowledged that he paid the performers because he still controlled all the money. The merchant bankcard application filled out in August 1997 lists Mr. DeuPree as the 100% owner of the corporation.

In addition, the 2/28/98 invoice to K-Beech from HCTV for the distribution sale of the movie was faxed over on that same date from HCTV listing same as coming from Mr. DeuPree with his address and telephone number, and listing Mr. DeuPree as CEO of HCTV. Although Mr. DeuPree testified in his deposition he thought the handwriting on these documents could have been his, he recanted this testimony at trial and stated upon further reflection he did not believe same to be his writing and that it was likely Dan Beck who faxed those documents during a visit at his office.

Director Cash Markman testified that based upon his conversations with the parties, he believed

Mr. DeuPree was either an investor or business partner of Dan Beck. Mr. Markman also testified that Mr. DeuPree attended a couple of the live shows.

The equitable owners of a corporation have been found to be personally or jointly and severally liable when they treat the assets of the corporation as their own and add or withdraw capital from the corporation at will, when they hold themselves out as being personally liable for debts of the corporation, or when they provide inadequate capitalization and actively participate in the conduct of corporate affairs. *Minton v. Cavaney* (1961) 56 Cal. 2d 576; *Like v. IAC (Katzer)* (1936) 1 CCC 29.

In this case, according to the Stock Transfer Agreement, defendant DeuPree controlled the money, wrote the checks, visited the set of other HCTV productions, had invoices for the movie faxed from his office to K-Beech on his letterhead listing himself as CEO of HCTV, and was to receive 100% of the profit and was to provide funding and banking assistance until such time as he was paid back in full on his investment, which, per DeuPree, never occurred. Further, Dan Beck, the alleged owner, would not receive profits but a set salary from the HCTV, until DeuPree was paid back his investment.

Although defendant is correct in asserting that the question of substantial shareholder status is not his burden, defendant knew that UEBTF was alleging such a status against him and failed to offer or produce any other documentary evidence supporting

the alleged stock issuance and transfer to Dan Beck. Despite testifying that he sold the business to Dan Beck through a contract and that the records were not destroyed, DeuPree failed to produce or introduce any evidence of this sale such as stock certificates, a stock ledger, accounting or tax records, or filings with the Nevada Secretary of State substantiating the sale and transfer.

As such, and based upon the totality of the documentary evidence as well as the testimony elicited from the witnesses, including defendant DeuPree, it was found that Robert DeuPree was a substantial shareholder of HCTV for the period 1/98 through 3/29/98.

RECOMMENDATION

For the reasons stated above, it is respectfully recommended that the defendant's Petition for Reconsideration be denied.

DATED: 1-14-08 /s/ Lisa Sussman
LISA A. SUSSMAN
Workers Compensation
Administrative Law Judge

Served on said date by mail
On the persons shown on the
Official address record.

By: /s/ [Illegible]

Court of Appeal, Second Appellate District,
Div. 7 – No. B206477
S166346

IN THE SUPREME COURT OF CALIFORNIA

En Banc

ROBERT DEUPREE, Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD,
Respondent;

MON DOE 43, et al., Respondents.

(Filed Oct. 1, 2008)

The petition for review is denied.

Kennard, J., was absent and did not participate.

GEORGE
Chief Justice